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No. 79-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

GRAYDON S. STARING
Two Embarcadero Center
Suite 2600
San Francisco, CA 94111
(415) 421-4600
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL & MADDEN
ROBERT H. MADDEN

LILLICK MCHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

1. Respondent's quibbling with the district court's opinion cannot obscure the correctness of that court's conclusion that on the agreed facts, the uncontroverted facts, and assumptions in Respondent's favor on all other material facts, summary judgment was proper.

II. Respondent argues as if the duty question concerned rules of general maritime law, not standards of general and land-based law, and relies virtually exclusively on *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, although *Gutierrez* was based upon a holding of nondelegable duty to the plaintiff, a principle expressly rejected by Congress for the 1972 amendments.

III. Respondent confuses the defense of assumption of risk with the duty element of a *prima facie* case of negligence. The distinction between duty, which arises from foresight and depends upon the reasonable expectation of the defendant, and assumption of risk, which turns solely on what the plaintiff knew, understood and voluntarily agreed to risk, has been acknowledged by judges, scholarly writers and the Restatement of Torts. As Respondent acknowledges, the disavowal of assumption of risk in the legislative history is only a resort to those principles established by this Court's rejection of assumption of risk, and therefore cannot be interpreted as a call for the abolition of restrictions on duty.

IV. Misconceptions in Respondent's brief require correction: the shipowner does not contend that negligence of a co-worker bars recovery, argue that plaintiff must prove it had actual knowledge of the danger, nor contend for immunity from liability; simple economics dictate that lien recoveries will reduce the stevedore company's safety incentive; comparative negligence principles do not indicate that the rule below promotes safety since the negligence of the stevedore company cannot be compared; and the assertion that lump sum payments subject to attorney's fees are as secure as compensation benefits is patently wrong.

ARGUMENT

I

THE SUMMARY JUDGMENT DOES NOT INVADE THE JURY'S PROVINCE

Respondent attacks the summary judgment first by quibbling through the district court's discussion of the facts.

A fair reading shows that the district court made all the necessary assumptions in Santos' favor. But what, if anything, the district court "found" and what assumptions it made are, in the last analysis, immaterial here. The question is simply whether the record supports the summary judgment and not how the district court opinion was written. To test the summary judgment we must take first the material facts expressly agreed in the record and then add those which are uncontroverted, make assumptions in Santos' favor as to any remaining material facts, and apply the proper legal principles to the result.

It has been unquestionably agreed that the stevedore "was in control of the loading";[1] the alleged jumpiness of the winch was known[2] and obvious[3]; a pallet board struck the pallet jack spilling sacks into the hatch;[4] thereafter the balance of the load was lifted about 15 feet while Santos cleaned up below;[5] and, while Santos was still engaged in this work, more sacks fell from the load, one of them striking him.[6] That the stevedore company never re-

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[1]Pre Trial Order, A.11, Agreed Fact 7.

[2]Brief of Respondent at 5 ("winch had been failing to hold . . . December 8th, 9th and 10th"), 7 (complaint to foreman December 8); Santos' deposition quoted Pet. App., p. A-5.

[3]Respondent's contention that there were two defects in the winch (Brief of Respondent at 20 n.8) is as unavailing as it is disingenuous. Santos himself testified that by "jumpy" he meant the condition resulting from the assumed defective brake. (Santos' deposition, p. 36.) The condition about which Respondent now complains was, in any event, both obvious and known to the stevedore company.

[4]Pre Trial Order, A.11, Agreed Fact 4.

[5]Pre Trial Order, A.11, Agreed Fact 5.

[6]Pre Trial Order, A.11, Agreed Fact 6.

ported or complained to the ship about the winch was uncontroverted by any proffer of evidence[7] of reports or complaints or that the vessel knew about it.[8] It was likewise uncontroverted that the vessel was not required to discover the alleged defect by any established standard,[9] and the vessel did not intervene by giving any directions in the circumstances.[10] It must be assumed, in addition, that the alleged defect of the winch brake caused both the first and the second fall of sacks of grain into the hold. In reviewing the summary judgment, these facts and no more (even those we have called uncontroverted being probably superfluous) are the ones which must be tested against the proper legal standard. It is that standard which must ultimately govern, whether on summary judgment or full trial, and that standard is the principal subject of this case.

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[7]Summary judgment is not to be denied simply because a plaintiff who does not come up with evidence might do so someday. *See, e.g.*, First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 288-90 (1968); ILWU v. Kuntz, 334 F.2d 165, 169 n.5 (9th Cir. 1964); Chambers v. United States, 357 F.2d 224, 229 (8th Cir. 1966); Berry v. Atlantic Coast Line R.R., 273 F.2d 572, 581-82 (4th Cir.), *cert. denied*, 362 U.S. 976 (1960); Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 404-05 (2d Cir.), *cert. denied*, 325 U.S. 861 (1945).

[8]Brief of Respondent at 15 n.5 clearly indicates the lack of such evidence. In that footnote Respondent attempts without foundation in logic or authority to impose the burden of its absence upon the vessel rather than upon the plaintiff.

[9]The record is devoid of any evidence or contention with respect to this standard. *See* Partenweederei, MS Belgrano v. Weigel, 299 F.2d 897 (9th Cir.), *cert. denied*, 371 U.S. 830 (1962).

[10]No such contention appears in the Pre Trial Order, A.12-15.

II

RESPONDENT PROVIDES ONLY CONFUSION AS TO THE SOURCES AND NATURE OF THE NEGLIGENCE RULES TO BE APPLIED

Throughout his brief, Respondent ignores the stated Congressional intent that the negligence remedy be governed by the duty standards of land-based law and treats the inquiry here as one concerning the rules of the general maritime law.

He poses the question whether the 1972 amendments "continue" or "create" a cause of action for negligence to divert attention from the real issue, which is whether the word "negligence" in Section 905(b) will be interpreted as Congress intended to avoid any "special maritime theory of liability" such as "non-delegable duty".[11] When the issue is so framed, it becomes evident that *Gutierrez v. Waterman Steamship Corp.*[12] does not control this case, for *Gutierrez's* negligence holding is founded upon the very principle of nondelegable duty Congress rejected.[13]

> [The shipowner] had an absolute and nondelegable duty of care toward petitioner not to create this risk to him, which it failed to meet.[14]

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[11]S. Rep. No. 92-1125, 92d Cong., 2d Sess. 10 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4703.

[12]373 U.S. 206 (1963).

[13]*Gutierrez*, indeed, was the very authority aptly cited by this Court to support its ruling in Albanese v. N/V Nederl. Amerik Stoom v. Maats., 382 U.S. 283 (1965), as to which *see* Brief of Petitioner at 12-13.

[14]373 U.S. at 211-12. The Court of Appeals for the First Circuit has recognized that the shadow of *Gutierrez* does not compel con-

Since *Gutierrez* is no longer authority for the rule or the result in the court below, Respondent has failed to cite any case at all from the "large body of case law" he acknowledges existed in 1972[15] to uphold the standard fashioned below. Petitioner, on the other hand, has shown at pages 11-19 of its brief that the standards adopted by the score of decisions in conflict with the decision below are supported by the *Hugev*[16] and *Mickle*[17] cases (cited with approval in *Burnside*[18]), and by the *West*[19] case, all decided before 1972, as well as by the Restatement and the large and consistent body of state law,[20] and that Congress has rejected for the future the standard represented by *Gutierrez* and

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tradiction of Congress' clearly expressed intention. Anderson v. Iceland S.S. Co., 585 F.2d 1142, 1150 (1st Cir. 1978).

[15]Brief of Respondent at 9-10.

[16]Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.* Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.) (adopting district court opinion), *cert. denied*, 363 U.S. 803 (1960).

[17]Mickle v. The Henriette Wilhelmine Schulte, 188 F. Supp. 77 (N.D. Cal. 1960).

[18]Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969).

[19]West v. United States, 361 U.S. 118 (1959).

[20]Respondent suggests (Brief at 34), as did the court below (Pet. App., p. B-16, 598 F.2d at 488), that Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968), calls for a rule other than that urged by Petitioner. But even in California, where a contractor is liable to provide a subcontractor with a safe place to work (Brief of Petitioner at 33 n.64) and comparative negligence principles apply, a contractor "cannot be held liable for an injury resulting from a danger which was obvious or which should have been observed in the exercise of ordinary care." Elder v. Pacific Telephone & Telegraph Co., 66 Cal. App. 3d 650, 661, 136 Cal. Rptr. 203, 208 (1977).

Albanese (a case which plainly dealt with negligence and not unseaworthiness as Respondent asserts).[21]

III

DUTY AND ASSUMPTION OF RISK ARE DIFFERENT CONCEPTS, AND RESPONDENT'S ARGUMENT IGNORES THE DISTINCTIONS WHICH HAVE BEEN DRAWN IN OPINIONS, COMMENTARIES AND THE RESTATEMENT

Respondent seeks to distort the rejected defense of assumption of risk so as to embrace in its rejection the whole notion of limits upon the conditions in which the defendant has a duty of affirmative action. He would thus confuse the foresight upon which the duty to exercise reasonable care is based with the actual events which could give rise to a defense of assumption of risk.

When not imposed by some positive rule, the duty of care ordinarily arises from foreseeability or expectation.[22] And in circumstances involving premises or chattels, as here, it is said to be based more particularly upon the defendant's having superior knowledge to that which the users may be expected to have or acquire,[23] and for this

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[21]The case itself, quoted in full in Brief of Petitioner at 12, refutes the claim of Brief of Respondent at 38 that it did not deal with negligence. Respondent's further statement, at the same place, that the committees "denied comment on the negligence remedy" is patently untrue. They clearly commented on its principles and declined comment only upon its operation in "a particular actual setting". S. Rep. No. 92-1125, 92d Cong., 2d Sess. 10 (1972).

[22]2 F. Harper & F. James, The Law of Torts 1018 (1956).

[23]Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. Penn. L. Rev. 629, 634 (1952).

reason the question whether a hazard is one which is known or obvious has been critical in such cases. The importance of incorporating such guidelines in jury instructions has also been stressed.[24]

In addition to being subject to a vast area of exceptions where consent was not free, informed and deliberate,[25] the defense of assumption of risk, especially in the master-servant cases in which it originated,[26] was subject to an accumulation of mischievous and unjust doctrinal extensions, which this court recognized in its FELA jurisprudence[27] and which undoubtedly led to the severe restriction of the defense in such cases, since it had come to rest, as between employer and employee "in the context of our industrial society, upon a pure fiction."[28] Sometimes the injured employee was presented no realistic choice,[29] but usually his consent sprang from carelessness and so represented simply a special case of contributory negligence.[30]

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[24]*Id.* at 641-42.

[25]W. Prosser, Law of Torts 447-52 (4th ed. 1971).

[26]Keeton, *supra*, at 636; Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58-60 (1943).

[27]*See* Tiller v. Atlantic Coast Line R.R., 318 U.S. at 63-64 ("primary duty", "promise to repair", "simple tool", "peremptory order").

[28]318 U.S. at 69 (Frankfurter, J., concurring).

[29]This was so in The Arizona v. Anelich, 298 U.S. 110 (1936) and Beadle v. Spencer, 298 U.S. 124 (1936), in which this court rejected the bar of assumption of risk in Jones Act cases involving defective vessel appliances.

[30]"The great majority of the cases involving assumption of risk have been of this type . . . ." Restatement (Second) of Torts § 496A, Comment d. *See also* Keeton, *supra*, at 633: "Again, a court will frequently use assumption of risk to mean one type of contributory negligence . . . ." And thus this Court, after *The Arizona* and *Beadle*,

The distinction between the defendant's duty based upon foreseeability or superior knowledge and the defense of assumption of risk arising from the plaintiff's determination to proceed in the face of danger is clearly recognized in case law both before and since the 1972 Amendments.[31]

The Restatement recognizes this distinction and implements it fully in the structure of its sections, defining the duty of the occupier of the premises or the furnisher of chattels in such sections as 343, 343A and 388, and separately defining the defense of assumption of risk in sections 496A, *et seq.*, and especially section 496C. These sections are not simply the other side of the duty coin but introduce different considerations. The Restatement explains the duty this way:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the condi-

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recognized that, where a real choice was presented, the question was one of contributory negligence. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939).

[31]Owens v. Union Pacific R.R., 319 U.S. 715, 720 (1943) ("What in fact was absence of departure from due care by the defendant came to be labelled 'assumption of risk'") *citing* concurring opinion of Justice Frankfurter in Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 72 ("But 'assumption of risk,' in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law"); Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1110 (4th Cir. 1977). Contrary to the argument in Brief of Respondent at 25-32, the Fifth Circuit cases have not condemned the Restatement or embraced Respondent's argument. Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977), directed the application of Restatement sections 343 and 343A as a proper way to avoid the application of assumption of risk. Wiles v. Delta S.S. Lines, Inc., 574 F.2d 1338 (5th Cir. 1978), never mentioned assumption of risk and merely remanded the case for reconsideration because it had been decided by the trial court before *Gay*.

> tions and dangers he will encounter if he comes. If he knows the actual conditions, the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.[32]

Section 496C, which deals explicitly with assumption of risk in connection with land or chattels, does not depend, as duty does, upon foreseeability and superior knowledge of the defendant, but upon the subjective understanding of the plaintiff and his voluntary acceptance of a risk, where the defendant actually has a duty because he could not have expected the plaintiff to discover it. Thus, the defense of assumption of risk has a function different from the concept of no duty.[33] The elements of the duty and the defense are sharply distinguished by the objective

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[32]Restatement of Torts § 343A, Comment e.

[33]W. Prosser, Law of Torts 455 (4th ed. 1971) ("This duty does not coincide with those risks which the plaintiff does not in fact assume; rather it is based upon what the defendant can reasonably expect of him."); Keeton, *supra*, at 634 ("It will be noted that the defense of assumption of risk serves a purpose here, not served by the limitation of the defendant's duty. The defendant may be guilty of a breach of duty in failing to eliminate or give notice of a danger of which the visitor is not charged with notice. Even so, if the visitor should become aware of the danger no recovery will be allowed.")

character of the former and the subjective character of the latter.[34] Comment e to section 496C makes this clear:

> The duty is determined upon the basis of what the defendant should expect, while assumption of risk is a matter of what the plaintiff knows, understands, and is willing to accept.

The Restatement formulation is the outcome of a spirited scholarly battle in the 1960's[35] between those who would maintain the separate existence of the defense of assumption of risk and those who would dismantle it and "distribute it between the concepts of duty and contributory negligence."[36] One of the defeated generals has pointed out, however, that the difference between the prevailing Restatement view and his own is significant only in a narrow area with which we are not here concerned,[37] and it appears that both armies agree no duty is owed where the hazardous condition of the premises or chattel is known.[38]

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[34]Keeton, *supra*, at 643 ("Certainly a test based on whether the defendant-occupier could reasonably expect the particular customer to discover and realize the danger is one that can be applied more easily and with fewer complications than a test which depends upon the state of mind of the plaintiff-customer and the justification which he asserts for not noticing or realizing a danger.")

[35]James, *Assumption of Risk: Unhappy Reincarnation*, 78 Yale L.J. 185, 188 (1968).

[36]W. Prosser, *supra*, at 454.

[37]James, *supra*, at 190.

[38]James, *supra*, at 189.

This Court has rejected assumption of risk in the employment context,[39] and has, we submit, never meant to raise up a duty of care and oversight where it did not exist or to make even an employer responsible to avoid ordinary risks of employment,[40] to say nothing of making a non-employer responsible for conditions he may reasonably assume are as well known to an independent contractor and his employees as to himself. And certainly there is no evidence that Congress wished to achieve such a result in 1972. Congress meant not to allocate new risks to the shipowner but, as Respondent acknowledges[41], simply referred to, acknowledged, and applied this Court's prior rulings on the subject.

IV

RESPONDENT HAS URGED OTHER MISCONCEPTIONS UPON THE COURT

A. Misconceptions of Petitioner's Position

Point D of Respondent's argument[42] seeks to make it appear that the shipowner would bar his recovery on the basis of a negligent act of his fellow servant. Having set up this straw man, Respondent easily knocks it down with

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[39]Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943); The Arizona v. Anelich, 298 U.S. 110 (1936); Beadle v. Spencer, 298 U.S. 124 (1936); Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939).

[40]*See* concurring opinion of Justice Frankfurter in Tiller v. Atlantic Coast Line R.R., 318 U.S. at 72, and The Arizona v. Anelich, 298 U.S. at 122.

[41]Brief of Respondent at 23.

[42]Brief of Respondent at 34-36.

the *Edmonds* case.[43] But the shipowner makes no such contention, its argument being directed to whether the shipowner prospectively should have assumed a duty and not whether in retrospect the breach of such a duty was excused by the actual negligence of stevedore employees.

Respondent likewise misstates the shipowner's position by asserting, in his point F, that the shipowner urges a requirement of actual notice of danger.[44] Reference to points I.B and C of Petitioner's brief, and especially the latter, should instantly refute this notion. He also asserts, in point F, that the shipowner is asking for immunity from liability as the means of encouraging safety.[45] This, too, is untrue. The shipowner contends, as point II.A of its brief indicates, not for a rule of immunity but for a rule which fosters safety by declining to shift the full burden of injury to the shipowner in cases in which the stevedore, who is primarily and immediately responsible for safe operations, has proceeded in a conspicuously unsafe manner. Respondent, in contrast, offers no analysis to support his implication that the rule below promotes safety.

B. Misconceptions of Law and Economic Reality

In addition to Respondent's gross misconception as to the involvement of assumption of risk or contributory negligence (to which we respond in point III above), he has displayed in his point F several other misconceptions of law and economic reality, most notably in relation to the economic motivations and consequences of third-party ac-

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[43]Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

[44]Brief of Respondent at 38.

[45]Brief of Respondent at 41.

tions. He pretends that because the employer is always subject to liability for compensation, the employer's interest in safety remains a constant, regardless of the outcome of third-party suits,[46] ignoring completely that the proceeds of third-party suits, after attorneys' fees, are applied to reduce or eliminate the liability of the employer for compensation. He thus studiously ignores that, apart from the interest of lawyers, third-party suits represent a contest of shipowners, not primarily with longshoremen, but with their stevedore employers.[47] And when he cites with satisfaction the lower court's statement that its rule "will promote safety within a comparative negligence framework",[48] he must ignore, as did that court, its inability to compare the negligence of the party primarily responsible for safety—the stevedore employer.[49]

Respondent also asserts that third-party suits cannot undermine the security inherent in a compensation system,[50] ignoring that recoveries in such actions are paid in a lump sum in lieu of some or all future compensation and consist to a very large extent of attorneys' fees. He asserts at another point that Congress could have regulated attorneys' fees if it had desired to do so.[51] It has indeed tried to do so by regulating the fees recoverable in com-

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[46]Brief of Respondent at 42-43.

[47]Of course, the shipowner is not the employer of the longshoreman as Respondent tries to imply (Brief of Respondent at 43).

[48]Brief of Respondent at 40.

[49]Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

[50]Brief of Respondent at 41-42.

[51]Brief of Respondent at 44.

pensation proceedings and indicating that such proceedings are to be normal and third-party suits exceptional.[52] The significance of this subject is highlighted by the fact that it is not a union of longshoremen but a group of plaintiffs' lawyers which has filed an amicus brief in support of Respondent's position.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the court should reverse the judgment of the Court of Appeals for the Ninth Circuit and thus restore the summary judgment entered by the district court and should also explicitly recognize the duty standard provided by land-based law for the guidance of lower courts in future cases.

Respectfully submitted,

GRAYDON S. STARING
Attorney for Petitioner

LEGROS, BUCHANAN, PAUL &
MADDEN
ROBERT H. MADDEN

LILLICK MCHOSE & CHARLES
EDWARD M. KEECH
Of Counsel

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[52]"We are cognizant of Congress' concern that negligence suits under the Act too often inure to the benefit only of the attorney, thereby needlessly increasing the volume of litigation generated by the Act." Johnson v. Sioux City & New Orleans Barge Lines, Inc., No. 80-1450 (7th Cir. August 21, 1980), *cert. denied*, 49 U.S.L.W. 3351 (November 10, 1980) (No. 80-359).